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MICHAEL RODAK, JR., CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1108

REPUBLIC INDUSTRIES, INC.,
Petitioner,

vs.

ELECTRONICS CORPORATION OF AMERICA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Wholly apart from a fatal procedural defect,[1] the petitioner would have this Court divert its time and resources from considering important matters to determining whether the Court of Appeals should have penalized an appellant by imposing counsel fees for taking up its time

[1] Petitioner, in violation of this Court's Rule 23(1)(a), has failed to include in its appendix the Statement of Agreed Facts (May 24, 1974) and supplement thereto (June 24, 1974) expressly "*incorporated by reference* and adopted as findings of fact by the [District] Court" in Paragraph 1 of its two brief memorandum opinions (Pet. A6-12), and without which those memoranda cannot meaningfully be read. The Petition should be summarily denied for this reason alone pursuant to Supreme Court Rule 23(4), since petitioner's omission constitutes a total failure to present "whatever is essential to a ready and adequate understanding of the points requiring consideration".

and resources by a frivolous appeal from a District Court decision in an action that should have been unnecessary in the first place. The decisions relied on by petitioner, far from signalling a conflict between the First and Second Circuits on the meaning of "frivolous" in Rule 38, F.R.A.P., show not only that there is harmony, but also that the Second Circuit expressly has followed the First in interpreting the Rule, as petitioner would have discovered by even elementary research. If that Rule so interpreted is invalid because it will discourage appeals in cases like this, so too is this Court's similar rule on groundless petitions,[2] unmentioned by petitioner. How else are busy Courts to protect themselves from reckless litigants with meritless cases taking their limited time away from issues of substance?

COUNTERSTATEMENT OF THE CASE

Petitioner might have argued that its omission of the Statement of Agreed Facts and supplement thereto, both part of the District Court's opinions, as noted above, was inadvertent and harmless, were it not for the fact that petitioner's STATEMENT (Pet. 2-4) likewise omits material facts contained in these omitted documents. Thus petitioner states only that respondent (hereinafter "ECA") adopted FIREYE in 1942 for furnace controls, and in 1951 for fire detectors, and that petitioner (hereinafter "Republic") first used the virtually identical "FIRE-EYE" on door closers activated by fire detectors in 1971. Republic would have this Court believe its conduct was innocent throughout, and trumpets the contention that no one ever accused it of being in "bad faith" (Pet. 3). Yet it fails to

[2] Rule 56(4) (". . . there appears to be no ground for granting such a writ . . .").

mention the following: In 1967, Republic requested a trademark search on FIRE-EYE for fire or smoke activated door closers (TX-55)[3], and, as a result, received an opinion letter from its attorney[4] warning of ECA's FIR-EYE and commenting that ECA "might be able to stop you" (TX-54). In 1968, the U. S. Patent Office rejected Republic's first trademark application for FIRE-EYE for fire detection equipment on the ground that the mark was confusingly similar to ECA's FIREYE registration.[5] Undaunted, Republic abandoned the FIRE-EYE application, and simply refiled it in early 1971 in a different patent office class for electrically operated hydraulic door controls, but again was rejected on ECA's FIREYE, and again abandoned the application.[6] As if a warning from its own attorney and two warnings from the U.S. Patent Office were not enough, Republic received a fourth warning from ECA's attorney later in 1971.[7] Yet all warnings went unheeded, suit had to be brought, trial was held three years later, and three days after trial the District Judge confirmed the unheeded warnings: ECA's trademark was valid and infringed. Incredibly, Republic turned a deaf ear even to the District Court's decision, for at a post-trial hearing, supposedly limited to the scope of the injunction, Republic's counsel attempted to relitigate the correctness of the basic

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[3] TX refers to the Trial Exhibits in the District Court.

[4] Statement of Agreed Facts, Par. 15 (hereinafter "AGREED FACTS").

[5] Agreed Facts, Par. 16.

[6] Agreed Facts, Par. 18. It was to these rejections by the Patent Office that the Court of Appeals referred when it stated: "Defendant, refused registration . . . nevertheless adopted it [FIRE-EYE]". Pet. A2.

[7] Agreed Facts, Par. 19.

findings of infringement,[8] to which the Court conclusively replied, ". . . FIRE-EYE has got to go."[9]

Having taken what can only be viewed as a dangerous gamble in chancing to use FIRE-EYE, Republic lost. It should have stopped there, but chose to appeal. The appeal was grounded essentially on two legal authorities, both of which were so easily distinguishable from the case at hand that Republic has yet to attempt to answer the distinctions,[10] and on the legal argument from these authorities that its customers are so sophisticated that they could not be confused by the use of identical trademarks on related products sold by different companies. Even if the argument had merit, the facts in the record did not support its application to the case.[11] Republic, in effect, was arguing an imaginary case. The Court of Appeals saw what Republic was trying to do, and assessed damages pursuant to Rule 38 of the Federal Rules of Appellate Procedure. Having at long last conceded the merits of the trademark issues, Republic in effect asks this Court to review a finding by the First Circuit that Republic's appeal to that court was "frivolous" pursuant to F.R.A.P. 38.

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[8] Appendix for Defendant — Appellant, pp. 184-193.

[9] Id., p. 193.

[10] The Court of Appeals remarked, "Plaintiff's mark is not comparable with the truly weak marks that defendant cities." Pet. A2. See also the Court's further comment about "the substantial differences between the case at bar and the two cases". Pet. A4.

[11] Republic's sales pitch was aimed squarely at the relatively unsophisticated end users — hospitals, schools, nursing homes, and the like. Appendix for Defendant-Appellant, pp. 155-159, 169, and 189-191.

REASONS FOR DENIAL

I. SUPERVISION OF THE APPLICATION OF F.R.A.P. 38 IS UNNECESSARY

Petitioner argues that F.R.A.P. 38, providing damages to appellee for a "frivolous" appeal to a Court of Appeals, is in need of guidelines. The argument is both factually and legally unsound.

Petitioner implies that the concept of a frivolous appeal is newborn with the July 1, 1968 effective date of F.R.A.P. 38. Hardly so; the concept of a frivolous appeal is an old and well established one. This Court has already determined in at least four different instances that an appeal or writ addressed to it was frivolous. *Roe* v. *Kansas,* 278 U.S. 191 (1929); *Slaker* v. *O'Connor,* 278 U.S. 188 (1929); *Wagner Co.* v. *Lyndon,* 262 U.S. 226, 231-234 (1923); and *Deming* v. *Carlisle Packing Co.,* 226 U.S. 102, 105-110 (1912).[12]

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[12] In each opinion the Court awarded damages for delay pursuant to variants of R.S. §1010 and 28 U.S.C. §878, the predecessors to 28 U.S.C. §1912, which provides:

> "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

Although F.R.A.P. 38 does not require a showing of delay, what this Court thought was frivolous in that statutory context is *a fortiori* applicable in the context of the Rule. The Court need not belabor what frivolous means. Indeed, certiorari has been denied in three cases within the last fifteen years in which petitioners sought review, inter alia, of an award of damages based on the finding that their appeal to the Circuit Court of Appeals was frivolous, the last of which was made under F.R.A.P. 38: *Ginsburg* v. *Stern,* 295 F.2d 698 (3 Cir. 1961), cert. den'd 368 U.S. 987 (1962); *Dunscombe* v. *Sayle,* 340 F.2d 311 (5 Cir. 1965), cert. den'd 382 U.S. 814 (1965); and *Clarion Corp.* v. *American Home Products Corp.,* 494 F.2d 860 (7 Cir. 1974), cert. den'd 419 U.S. 870 (1974).

In *Roe* v. *Kansas*, supra, the Court found little merit in the plaintiff in error's constitutional attack on a state statute condemning places of unusual historical interest. In assessing a penalty and costs, the Court stated (p. 192):

> "The alleged grounds [for the writ of error] are so lacking in substance that they may be properly designated as frivolous."

Lower federal courts have long known what a frivolous appeal is. In *Cash* v. *United States*, 261 F.2d 731 (C.A.D.C. 1958), vacated on other grounds 357 U.S. 219 (1958), the Court, applying a federal statute on *in forma pauperis* appeals,[13] pointed out (pp. 735-6):

> " 'Frivolous' has a colloquial meaning of trifling or silly. It also has *an established meaning in law, when applied to appeals, of 'manifestly insufficient or futile',[7] 'without merit and futile'.*[8] In the sense of being silly or trivial these petitions are never frivolous in the mind of the petitioner. Often, however, they are frivolous in the legal sense, in the sense of being 'without merit and futile'.
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> "In this [legal] sense 'frivolous' means *without any realistic chance of success on the merits, without an issue warranting consideration by the appellate court, or without substantiation in the record.*"[14]

"7. Oxford English Dictionary (1933); Bouvier, Law Dictionary (3d rev. ed. 1914).

8. [Citations omitted.]"

The enactment of F.R.A.P. 38 thus presents no new question of construction. Indeed, had petitioner, instead of bemoaning any lack of "guidelines" (Pet. 7), taken the trouble

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[13] 28 U.S.C. §1915(a), 62 Stat. 954 (1948).

[14] Emphasis ours unless otherwise noted. Footnotes omitted except for notes 7 and 8.

to present to the Court the Advisory Committee's Note to Rule 38, the purpose and legislative background of the Rule would have been clear. That Note states:

> "Compare 28 USC §1912. While both the statute and the usual rule on the subject by courts of appeals (Fourth Circuit Rule 20 is a typical rule) speak of 'damages for delay,' the courts of appeals *quite properly allow damages, attorney's fees and other expenses incurred by an appellee if the appeal is frivolous without requiring a showing that the appeal resulted in delay.* See Dunscombe v. Sayle, 340 F.2d 311 (5th Cir. 1965), cert. den., 382 U.S. 814, 15 L Ed 2d 62 (1965); Lowe v. Willacy, 239 F.2d 179 (9th Cir. 1956); Griffin Wellpoint Corp. v. Munro-Langstroth, Inc., 269 F.2d 64 (1st Cir. 1959); Ginsburg v. Stern, 295 F.2d 698 (3rd Cir. 1961). • • • *[D]amages are awarded by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant.*"

The Rule recognizes that a meritless appeal unnecessarily burdens both the court and the appellee, regardless of whether appellant has sought a stay of any judgment below against him (the purported "delay" of the statute). Petitioner's suggestion that an important question is involved here is simply the result of its failure to do any elementary research into the history of the Rule or the precedents interpreting "frivolous" appeals.

As to Republic's claim that the right of appeal is impaired because a court of appeals may penalize an appellant simply because the court disagrees with him, characterizing his contentions as "frivolous" (Pet. 7), Republic has not shown even one instance in which this has ever occurred. If a court of appeals had ignored the well settled legal meaning of "frivolous", such an abuse would not warrant throwing out the Rule or discarding the "fri-

volous" standard, though the court's action should be corrected. The judicial system depends on the good faith and wisdom of courts in applying statutes and rules properly without distortion of their intended meaning, and Republic has presented nothing to make this Court believe that Rule 38 has not been so applied.

Republic's implicit assumption that the Court of Appeals simply disagreed with it in this case is a gross misinterpretation of what the Court of Appeals said and a gross overestimation of the merit of both Republic's defense in the District Court and its case on appeal.

In the broader context of any statute or rule assessing damages or counsel fees against an unsuccessful litigant (compare the patent provisions, 35 U.S.C. §§284, 285, the general provisions, 28 U.S.C. §§1912, 1927, and the rule as to petitions for certiorari, Supreme Court Rule 56(4)), a litigant and his attorney must be prepared to exercise care in deciding whether or not to press litigation. Yet no one, to our knowledge, has successfully argued that such statutes impair the right to resort to the courts or to appeal. We are aware of this Court's stated policy against freely awarding attorney's fees to successful litigants. *Fleischmann Corp.* v. *Maier Brewing,* 386 U.S. 714 (1967). Yet the Second Circuit has expressly held that the discretionary power of a court of appeals under F.R.A.P. 38 to award damages and costs is not limited by *Fleischmann. Fluoro Electric Corporation* v. *Branford Associates,* 489 F.2d 320, 326 (1973) ("[*Fleischmann*] has no relevance here").[15] The alleged impairment of right to appeal is a

[15] Nor does *Fleischmann* have relevance to federal trademark infringement actions anymore, since, effective January 2, 1975, §35 of the Lanham Act, 15 U.S.C. §1117, has been amended by addition of the following at the end thereof:

"The Court in exceptional cases may award reasonable attorney fees to the prevailing party."

sham. What Republic really seeks is a sympathetic reversal of an exercise of discretion by the First Circuit.

II. COURTS OF APPEALS NOT IN CONFLICT

Republic has scanned a few Courts of Appeals opinions, and in the Petition magnified semantic differences therein into "conflicts", especially between the First and Second Circuits (Pet. 4-7).

It says that the Second Circuit requires a finding of "bad faith" or "calculated delay" before damages will be awarded under F.R.A.P. 38, and that this is a different and stricter test than that of the First Circuit. That might be a conflict if it were true, but the Second Circuit itself sees no conflict between its construction of Rule 38 and that of the First Circuit. Thus in the Second Circuit's most recent, thoughtful, and extensive application of Rule 38, *Fluoro Electric Corporation* v. *Branford Associates,* 489 F.2d 320, 326 (1973), the Court relied heavily on a leading First Circuit opinion on Rule 38, *National Labor Relations Board* v. *Smith & Wesson,* 424 F.2d 1072, 1073 (1970). The following language of the Court makes plain that petitioner's "conflict" was concocted (p. 326):

> "Rule 38 is not premised on a showing of delay in prosecuting an appeal[16] . . . . Rather the determination is one of doing justice between the parties, of penalizing a party for unnecessarily wasting the time and resources of the court. *NLRB* v. *Smith & Wesson,* 424 F.2d 1072 (1st Cir., 1970)."

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[16] This statement alone makes erroneous Republic's contention that "calculated delay" is one of two alternative prerequisites (the other, "bad faith") in the Second Circuit for a Rule 38 penalty (Pet. 4). The opinion cited by petitioner for this, *Oscar Gruss & Son* v. *Lumbermens Mutual Casualty Co.,* 422 F.2d 1278 (1970), did indeed find calculated delay, but nowhere indicated that such a finding of delay was required.

The Court then criticizes the appellant for taking numerous meritless appeals, concluding (p. 326):

> "Rule 38 was designed to penalize litigants for just such tactics as these and to compensate those who have been put to the expense of answering such wholly frivolous appeals. *NLRB* v. *Smith & Wesson*, supra; . . . *Griffin Wellpoint Corp.* v. *Munro-Langstroth, Inc.*, 269 F.2d 64 (1st Cir., 1959)."[17]

In light of the Second Circuit's own reliance on current First Circuit authority for interpreting Rule 38, it is clear that the Second Circuit would just as likely have assessed Republic with damages for its conduct under that Rule as the First Circuit.

Republic's reliance on the earlier Second Circuit opinion, *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079, 1091-92 (1971), as setting forth a stricter test than that of the First Circuit is undercut, not only by the Second Circuit's later *Fluoro* opinion, supra, but also by the fact that in *State of West Virginia*, the act charged as making the appeal frivolous, namely, a delay to obtain an extra month's interest, had not been sufficiently proven. Furthermore, the "bad faith" language of *State of West Virginia* was used generally with reference to 28 U.S.C. §§1912, 1927 ("unreasonably and vexatiously"), and F.R.A.P. 38. When in *Fluoro* the Second Circuit zeroed in on F.R.A.P. 38, it found no conflict with but rather relied upon the First Circuit's analysis. Likewise, the Tenth Circuit opinion, *Carlock* v. *National Co-Operative Refinery Association*, 424 F.2d 148, 152 (1970), relied upon by Republic as indicating that "delay" was a requirement of F.R.A.P. 38 (Pet. 4), did not state that at all. It said that in each of appellants'

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[17] $4,500 in damages and $598.70 in costs were awarded appellee under Rule 38.

cited authorities for awarding damages delay had been found. The Court never suggested that with the proper case before it, it would not have awarded damages absent a showing of delay, consistent with the Second Circuit in *Fluoro* and the First Circuit here. Equally futile is Republic's attempt to conjure up any conflict with the Seventh Circuit by virtue of its opinion in *Clarion Corp.* v. *American Home Products Corp.*, 494 F.2d 860, 865-6 (1974), cert. den'd 419 U.S. 870, for there the Court not only found the same harm as that done here, namely, "a shameful waste of judicial manpower" and "the expense of answering such wholly frivolous appeals", but also it then cited with obvious approval both the First Circuit in *NLRB* v. *Smith & Wesson*, supra, and the Second Circuit in *Fluoro*, supra.

It is understandable why Republic did not cite F.R.A.P. 38 opinions in other circuits, for it would then have been even more obvious that the Rule has been properly and uniformly administered throughout the federal appellate system. *E.g., R. L. Renken* v. *Harvey Aluminum (Incorporated)*, 475 F.2d 766 (9 Cir. 1973) ("no merit"; awarding double costs); *United States* v. *Certain Land In Squares 532 and 570, Parcels 1 and 9*, 473 F.2d 94 (C.A.D.C. 1972) (not "even a faint hope of success on the legal merits"; awarding all costs); *Furbee* v. *Vantage Press, Inc.*, 464 F.2d 835, 837-8 (C.A.D.C. 1972) ("utterly without merit"; ". . . nothing in Appellant's argument on appeal which casts the remotest doubt on [Appellee's] cases"; awarding attorney's fees and costs); and *Eaton* v. *New Hanover County Board of Education*, 459 F.2d 684, 686 (4 Cir. 1972) (". . . the Board continued to urge its own inadequate proposal [in the face of the Board's admission that the HEW plan was the best plan for complete desegregation]"; awarding attorney's fees and costs).

III. REPUBLIC'S APPEAL WAS INDEED FRIVOLOUS

As pointed out, supra, pp. 2-4, the Court of Appeals had ample facts on which to conclude that the appeal before it was frivolous. First of all, Republic's good faith in defending this lawsuit in the District Court was questionable in view of the warnings of its own attorney, the Patent Office, and ECA's attorney. But Republic got its day in court, although the District Court's findings, all fully supported in the record, should have dispelled any illusions that there was any merit left to its case. A post-trial hearing afforded Republic an unavailing rehash of some of its previous contentions.[18] Further litigation at this point was simply a shameful waste of the First Circuit's time and of ECA's time and money. What the Second Circuit said in *Hanley* v. *Condrey*, 467 F.2d 697, 700 (1972), rings true here as well:

> "With the documented and undisputed facts before him, there is a real question as to whether this attorney should have brought the declaratory judgment action in the first place. In the light of Judge Levet's lucid opinion, any *appeal* was patently frivolous.
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> "This litigation should now be at an end."

As noted, the appeal was grounded on two legal authorities, the more notable of which was *Clayton Mark & Co.* v. *Westinghouse Electric Corp.*, 356 F.2d 943 (C.C.P.A. 1966), fully argued below in Defendant's Trial Brief and at the post-trial hearing. The District Court was unimpressed, ECA fully distinguished both cases at the trial argument and in its appeal brief,[19] and the First Circuit reiterated

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[18] See pp. 3-4, supra.

[19] See Brief for Plaintiff-Appellee, pp. 23-24, 26-27.

their irrelevance in denying Republic's petition for rehearing (Pet. A4):

> "Appellant was faced . . . with the substantial differences between the case at bar and the two cases upon which it principally relied, clearly pointed out in the language of the opinions* . . . . "
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> **Inter alia,* that plaintiffs' marks there were in broad, general use, and were non-fanciful."

Likewise, the sophisticated customer argument had no basis in fact, for the record undeniably established that Republic advertised to and promoted its FIRE-EYE products with the supposedly unsophisticated end users.[20]

The above conduct is unquestionably frivolous within the meaning of F.R.A.P. 38, and Republic's conduct in filing this Petition is equally frivolous.

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[20] See note 11, supra, and the First Circuit's opinion at Pet. A3 and denial of rehearing, Pet. A4. Republic's assertion that the Court of Appeals "equated petitioner's goods with a bar of soap" (Pet. 4, 7) is absurd, reflecting a distortion of what the Court said in footnote 2 of its main opinion (Pet. A3). The Court was obviously drawing an analogy to the case of another very well known mark, IVORY SOAP, in support of the well settled principle that use of a housemark does not necessarily prevent confusion, and indeed, may aggravate it, citing *A. T. Cross Co.* v. *Jonathan Bradley Pens, Inc.*, 470 F.2d 689, 692 (2 Cir. 1972). Petitioner's comment makes one wonder about its good faith before this Court.

CONCLUSION

For the foregoing reasons certiorari should be denied.[21]

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[21] It is also within the Court's discretion to award reasonable damages to respondent, should the Petition be denied. Supreme Court Rule 56(4).